No. 17049

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM CARL CUNNINGHAM, ET UX., and GLENN A. PRICE, ET UX., *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Arizona

(No. Civ.-2962 Phx. and No. Civ.-2963 Phx.)

Brief of Appellants

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INDEX

29

TABLE OF AUTHORITIES CITED

Cases

Page

Page

STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

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JURISDICTION

This is an appeal from a final order of the District Court of the District of Arizona, dated April 28, 1960, in which the Honorable Dave W. Ling, United States District Judge, presiding over the Phoenix Division, failed to grant and denied the appellants' motion to vacate judgment of dismissal with prejudice and to renote the appellants' claims for trial [R. 229], 28 U.S.C.A. § 1291 (62 Stat. 929 as last amended by 72 Stat. 348).

The claims are within the jurisdiction of the District

Court of Arizona pursuant to the laws of the state of Arizona as incorporated by the federal law, and upon rights under the Federal Tort Claims Act of August 2, 1946, 28 U.S.C.A. 1346(b) and 2671 *et seq.*; and the amounts in controversy exceed the sum of $10,000.00 for each of the appellants.

The original order of dismissal with prejudice, dated October 6, 1960, has the effect of an adjudication upon the merits without hearing thereon, but is not the subject of this appeal, other than by way of the question as to whether it was an abuse of discretion of the District Court in denying the appellants an opportunity to have their day in court [R. 199].

QUESTIONS PRESENTED

1. Did the court abuse its discretion in failing to grant and in denying the appellants' motion to vacate judgment?

2. Was the court in error in disregarding the appellants' uncontroverted affidavits?

3. Under the showing on the record, should the appellants be given an opportunity to try their claims on the merits?

4. Should the court have granted the appellants' motion to vacate judgment and have renoted their claims for trial under Rule 60(b) ?

STATUTES INVOLVED

Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 60(b): This appeal involves an interpretation and decision by the court as to whether or not the appellants are entitled to have their claims under the federal tort claims act, 28 U.S.C.A. §§ 1346(b) and 2671 *et seq.*, reopened and renoted for trial on the merits.

STATEMENT OF THE CASE

On or about the 14th day of October, 1958, the appellants filed and commenced actions in the United States District Court of the District of Arizona alleging injuries and damages negligently caused by the United States of America or its servants or agents on or about October 18, 1956 [R. 3-12]. Subsequently, on January 19, 1959, their claims were consolidated for trial [R. 19], and for all purposes are treated as a single case although involving two separate and individual claims. All proceedings including the judgment of dismissal which the appellants are attempting to set aside have been treated jointly, and the appellants are jointly prosecuting this appeal, because the issues are in all respects identical [R. 199 to end].

The appellants flew from Vashon, Washington, to Phoenix, Arizona, on or about October 1, 1959, arriving in Phoenix on that day, for the purpose of conferring with their counsel Hash and Hash in anticipation of trial of their claims which were set for October 6, 1959 [R. 221-226]. On Monday, October 5, 1959, their counsel Virginia Hash erroneously advised them not to show up in court for trial, and subsequently took upon

herself to withdraw from the case and to leave the appellants without representation in court. The appellants did not know where to obtain representation from other counsel on such short notice, and were intimidated into not appearing in court for trial without counsel. The United States attorneys thereupon took advantage of the appellants and obtained a judgment of dismissal with prejudice [R. 199, minute entry judgment].

Subsequent thereto, the appellants obtained counsel in Seattle, Washington, and conferred with respect to reinstating their claims for injuries and damages in the Arizona District Court. Counsel thereupon applied to the District Court in Arizona for a motion to vacate judgment pursuant to 28 U.S.C.A., Rule 60, Federal Rules of Civil Procedure [R. 207 and Appendix "B"].

Counsel presented the appellants' motion to vacate and supporting affidavits to the District Court, and presented oral argument for the purpose of reinstating their claims for injuries and damages [R. 215-226]. However, the court abused its discretion and denied the motion to reinstate and renote their claims [R. 207 and 229]. From the order of the court, the appellants take this appeal [R. 230-244].

Upon receipt of the appellants' motion for security and costs [R. 204], the appellants promptly deposited with the United States attorney's office in Phoenix, Arizona, the full amount of costs claimed against them [R. 206].

The appellants have at all times acted in good faith, and have applied to the court for an order vacating their claims for injuries and damages. However, the District Court has not reciprocated, and has simply dismissed their application without any reason whatsoever. There is nothing in the record to support the District Court's ruling and dismissal with prejudice against the appellants.

SPECIFICATIONS OF ERROR

1. The court erred in dismissing the appellants' claims with prejudice.

2. The court erred in failing to grant and in denying the appellants' motion to set aside and vacate its order of dismissal entered into the minutes on October 6, 1959.

3. The court abused its discretion in ignoring the appellants' uncontroverted affidavits in support of their motion to set aside and vacate judgment.

4. The court went beyond the scope of its authority in failing to apprise the appellants of its criteria for ignoring and for failing to grant and for denying their motion to vacate and set aside the judgment.

5. The court abused its discretion in failing to inform itself of possible facts which could sustain its refusal to vacate and set aside judgment of dismissal.

6. The court abused its discretion in failing to permit and in denying the appellants an opportunity to litigate their claims on the merits.

7. The court abused its discretion in adjudicating the appellants' claims without delving into the merits.

SUMMARY OF ARGUMENT

This appeal is from an order denying appellants' motion to set aside and vacate a final judgment rendered by the District Court of the District of Arizona, Phoenix Division, in which the court dismissed the appellants' claims with prejudice for want of prosecution, *Kuzma v. Bessemer & Lake Erie Railroad,* 3 Cir., 1958, 259 F.2d 456.

Even if the order is modified to restore the appellants' claim to a dismissal without prejudice, the statute of limitations has at all times been lapsed, Arizona Revised Statutes, Section 12-542. Therefore, even a dismissal without prejudice operates as a bar against trial on the merits.

The District Court should have resolved all doubts in favor of the appellants, on the basis of their uncontroverted and uncontradicted affidavits, and should have exercised its discretion under Rule 60(b) FRCP in favor of permitting the appellants to have the opportunity of trying their claims on the merits, rather than operating a forfeiture against them.

The specifications of error which we have outlined are so interwoven that we treat them essentially as one giant error which we make into a single topic for the purpose of argument.

ARGUMENT

I.

The District Court abused its discretion in failing to vacate and set aside its order of dismissal, in refusing to grant the appellants' motion, and in denying their motion for order setting aside the order of dismissal for apparent want of prosecution.

The appellants treat as axiomatic, with reference only to common sense, and without reference to any direct authority, that it is normal practice, in cases of unwarranted default maneuvers, to come into the very court which rendered the default and to apply under the appropriate rule (in this case Rule 60(b) Federal Rules of Civil Procedure) for an order of vacation, rather than a simple and direct appeal: How would an appellate court react to a dismissal with prejudice taken upon a default without the affidavits which the appellants have furnished the District Court?

This court has stated in *Russell v. Cunningham,* 9 Cir., 1960, 279 F.2d 797, 802:

> "An order denying a 60(b) motion terminates proceedings in the District Court and therefore is a final and appealable order. Cromelin v. Markwalter, 5 Cir., 1950, 181 F.2nd 616; In re Marachowsky Stores Co., 7 Cir., 1951, 188 F.2d 686; Darlington v. Studebaker-Packard Corp., 7 Cir., 1959, 261 F.2d 903; 7 Moore's Federal Practice (2 ed. 1955) § 60.30(3); 3 Barron and Holtzoff, Fed. Prac. & Procedure § 1332. These cases expressly state an order denying a motion under Rule 60(b) is appealable. In addition, there are many cases where appeals from denial of relief under 60(b) have been considered and passed upon without dis-

cussing the appealability of the order. The Supreme Court has done so. Ackerman v. United States, 1950, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207; see Klapprott v. United States, 1949, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. So have other courts. See, e.g., cases cited in Darlington v. Studebaker-Packard Corp., 7 Cir., 1959, 261 F.2d 903. So has this Court. Stafford v. Russell, 9 Cir., 1955, 220 F. 2d 853; Atchison, Topeka & Santa Fe Ry. Co. v. Barrett, 9 Cir., 1957, 246 F.2d 846.

"There is a line of cases, of which Hicks v. Bekins Moving & Storage Co., 9 Cir., 1940, 115 F. 2d 406, 409 is representative, stating 'The general rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree or order.' However, 'the rule has always been subject to not too clearly defined exceptions, sometimes characterized as an abuse of discretion.' Greenspahn v. Joseph E. Seagram & Sons, 2 Cir., 1950, 186 F.2d 616, 619. This 'exception' is firmly established and an order denying a motion made under Rule 60(b) is reviewable and will be set aside if an abuse of discretion is found."

A. The district court abused its discretion in laying aside and in ignoring undenied affidavits presented by the appellants.

The appellants presented affidavits in support of their motion to vacate the judgment of dismissal based upon their having failed to prosecute. They gave their reasons which were essentially that they were misadvised and misapprised by counsel. The respondent sent out F.B.I. agents to investigate the truth of the appellants' affidavits, but produced nothing for the court record, and therefore in fact admits the truth of the

affidavits in their entirety. The court did not feel disposed to take any additional evidence on the matter, but ruled that upon the affidavits there was no sufficient justification for setting aside or vacating its previous dismissal with prejudice.

The law clearly favors trial of all claims, particularly when there are substantial rights or amounts of money involved, upon the merits, and disfavors summary disposals by default or otherwise.

Rooks v. American Brass Company, 6 Cir., 1959, 263 F.2d 166, 169, is illustrative of this point, in the following words:

> "It has been declared in the Courts of Appeals that matters involving large sums of money should not be determined by default judgments if it can be reasonably avoided. Tozer v. Charles A. Krause Milling Company, 3 Cir., 189 F.2d 242, 245.
>
> "The court also declares:
>
> " 'Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. Huntington Cab Co. v. American Fidelity & Casualty Co., D.C. W.Va. 1945, 4 F.R.D. 496, 498; Standard Grate Bar Co. v. Defense Plant Corp., D.C.Pa. 1944, 3 F.R.D. 371, 372. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments.' "

B. The district court abused its discretion in permitting a manifestly inequitable and unconscionable judgment to stand.

Where a claim has been dismissed with prejudice, while there are still genuine issues of fact to be re-

solved, upon an apparent but purely formalistic default, or dismissed without prejudice after the lapse of the statute of limitations, it is manifestly unjust or unconscionable to enforce the order of dismissal when the defaulted parties subsequent to the order make seasonable application to the court for reinstatement of their claims, and ask the court's indulgence in reviving their claims. The court should, with the ends of justice and good conscience in mind, assist the defaulted parties toward obtaining a full, fair and impartial consideration of their claims upon the merits. *Block v. Thousandfriend,* 2 Cir., 1948, 170 F.2d 428; *West Virginia Oil & Gas Co., Inc. v. George E. Breece Lumber Co., Inc. et al.,* 5 Cir., 1954, 213 F.2d 702.

The second circuit rendered an early decision under the present rules in *Block v. Thousandfriend, supra,* and stated at page 430 of the opinion:

> "Rule 60(b), which became effective in March, 1948, provided not only that a judgment might be reversed for newly discovered evidence, but also in cases where 'it is no longer equitable that the judgment should have prospective application,' or might be reversed for 'any other reason justifying relief from the operation of the judgment.' "

The fifth circuit agreed with the decision of the *Block* case, above, in *West Virginia Oil & Gas Co., Inc. v. George E. Breece Lumber Co., Inc. et al., supra,* at page 704 of its opinion:

> "On the other hand, the desire of the courts to repair an injustice wrought by a judgment will overcome the necessity for finality where it is

against conscience to execute that judgment and where that judgment was rendered without fault or neglect on the part of the party seeking to reform it. Marine Insurance Company of Alexandria v. Hodgson, 7 Cranch 332, 336, 11 U.S. 332, 336, 3 L.Ed. 362.

"Before the advent of the Federal Rules and from time immemorial, a judgment could not be corrected or reformed after the term of court had expired. In order to circumvent the rigor of this rule, courts of equity in their resourcefulness historically have recognized various types of writs and bills granting relief from judgments unconscionably obtained, including writs of coram nobis, coram vobis, audita querella, bills of review, bills in the nature of a bill of review, and the independent action in equity. As a result, the whole subject of ancillary remedies for relief from final judgments became 'shrouded in ancient lore and mystery.' In an effort to cut a path through this 'ancient lore and mystery,' the Federal Rules in Rule 60 set up a procedure for seeking relief from final judgments."

The District Court was most unfair in closing itself to remedy by the appellants. It was not concerned with the truth or falsity, or sufficiency with the appellants' showings, and arbitrarily, summarily, and unjustly foreclosed the appellants contrary to the express dictates of *United States v. Backofen,* 3 Cir., 1949, 76 F.2d 263 (following the Klapprott case), and *Federal Deposit Insurance Corporation, to the Use of the Secretary of Banking v. Alker,* 3 Cir., 1956, 234 F.2d 113, in which it was held that the District Court, upon assum-

ing jurisdiction over a motion for relief under Rule 60(b) Federal Rules of Civil Procedure, must conduct hearings to determine the truth or falsity of the applicant's motion before rendering any decision denying the application.

In support of appellants' contention that they should be awarded a trial on the merits, they call the court's attention to *United States v. Jordan,* 6 Cir., 1951, 186 F.2d 803, 806, affirmed 342 U.S. 911, 72 S.Ct. 305, 96 L.Ed. 682, in which the sixth circuit court declared:

> "And it has long been a recognized exception to the general rule that under certain circumstances, such as where it is manifestly unconscionable for a successful adversary to enforce a judgment in his favor, relief will be granted by a court of equity against such judgment, regardless of the expiration of the term of its entry (Citing authorities)."

II.

The appellants should not be charged with erroneous advice of counsel, and should be permitted to reopen and renote their claims for trial on the merits.

The appellants were unable to present their claims in court for trial on the merits because of advice given by their counsel, and by their counsel's withdrawal from the cases on short notice. If they had had more time within which to act, they would certainly have had time to obtain counsel and receive a full trial on the merits and would not have been thrown out of court. There are a number of cases in which the court has stated that a claim can be reopened where the client should not be

charged with mistaken or erroneous advice on the part of counsel. See *Patapoff v. Vollstedt's Inc.,* 9 Cir., 1959, 267 F.2d 863; *Barber v. Turberville,* D.C. Cir., 1954, 218 F.2d 34; *Lucas v. City of Juneau,* D.C. Alaska, 1957, 20 F.R.D. 407.

Barber v. Turberville, supra, 36, states:

> "In our opinion Rules 55(c) and 60(b) should be given a liberal construction. The dismissal by the trial court of the first count of the complaint and the substantial reduction of the award below the damages claimed under the second count indicate at the very least, that mitigating circumstances exist. For the plaintiff's part, no intervening equities are alleged which would cause hardship in the event the default were vacated, and the defendant has offered to post security for the amount of the judgment. Under these circumstances, consideration certainly may be given to the claims of a party requesting a proper trial of the action. See Bridoux v. Eastern Air Lines, Inc., 1954, 93 U.S. App. D.C. 369, 214 F.2d 207; Tozer v. Charles A. Krause Milling Co., 3 Cir., 1951, 189 F.2d 242, 245.
>
> "That the defendant personally was not negligent in the protection of her interests seems clear from the facts recited. In situations such as are here disclosed, the courts have been reluctant to attribute to the parties the errors of their legal representatives. See e.g. Elias v. Pitucci, D.C.E.D. Pa. 1952, 13 F.R.D. 13; Kantor Bros. v. Mutual Construction Co., D.C.E.D. Pa. 1943, 3 F.R.D. 227; Robins v. Pitcairn, D.C.N.D. Ill. 1940, 3 F.R.S. 60b.21, Case 2."

The District Judge may have been under a misappre-

hension as to the effect of his decision, particularly in that the United States attorneys argued in their briefs that the previous decision was a dismissal without prejudice [R. 228], and in view of the fact that there is nothing in the record to indicate that the statute of limitations bars a new action.

Patapoff v. Vollstedt's Inc., 9 Cir., 1959, 267 F.2d 863, 865, states clearly with regard to an error or misunderstanding by the judge with respect to the manner in which he unwittingly forecloses a party by an order of dismissal, as follows:

> "Both sides accept as correct the statement of appellant's brief that 'appellant had, at the time the "Confession" was signed, a complete defense to the involuntary petition.' That was the record made on the motion.
>
> "The record also discloses that at the time he denied the appellant's motion, the trial judge was laboring under a misapprehension as to the consequences of his denial. Just after the attorneys had closed their arguments on the motion and left the court room, the Court stated: 'There is a presumption that things done in the ordinary course of business are done according to the law. I don't want to foreclose those parties of a right to be heard. They can be heard if they file their answer. That will take care of it.'
>
> "The judge was wrong. Gratiot County State Bank v. Johnson, 249 U.S. 246, 39 S.Ct. 263, 63 L.Ed. 587. He did not 'want to foreclose' appellant, but foreclose here he did.
>
> "We think that on this record it was an abuse of

discretion for the court to deny the motion to vacate the adjudication. Rule 60(b) is clearly designed to permit a desirable legal objective: that cases may be decided on their merits. 'The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. * * * Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments.' Tozer v. Charles A. Krause Milling Co., 3 Cir., 189 F.2d 242, 245; accord, Bridoux v. Eastern Air Lines, D.C. Cir., 214 F.2d 207, 210." (Ellipses by the court).

"As stated by Mr. Justice Black in Klapprott v. United States, 335 U.S. 601, 614, 69 S.Ct. 384, 390, 93 L.Ed. 266: 'In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments, whenever such action is appropriate to accomplish justice.' Cf. Bridoux v. Eastern Air Lines, supra.

"Here the appellant made a showing that she had a defense which she was misled into waiving through the erroneous action of the attorney. She made that showing very promptly. The trial court, although stating 'I don't want to foreclose' this party, nevertheless, because of its plain misapprehension of the situation, accomplished just that foreclosure by its order. This involved something less than the 'careful study of all relevant considerations' referred to in Tozer v. Charles A. Krause Milling Co., supra."

III.

Under the appellants' showings, this Court should not hesitate to reverse the District Court, and to direct the District Court to renote and reset their claims for trial on the merits.

It is manifestly unjust to dismiss a complaint with prejudice for want of prosecution, and to refuse to vacate such order of dismissal. See *Tozer v. Charles A. Krause Milling Co.,* 3 Cir., 1951, 189 F.2d 242, 244:

> "A motion to set aside a default judgment is addressed to the sound discretion of the court, and should not be disturbed on review unless there has been an abuse of discretion. See Orange Theatre Corp. v. Rayherstz Amusement Corp., 3 Cir., 1942, 130 F.2d 185, 187. In a somewhat analogous situation, however, the court, in the interests of justice, has not hesitated to reverse an order and judgment dismissing a complaint with prejudice for lack of prosecution. Peardon v. Chapman, 3 Cir., 1948, 169 F.2d 909, 913."

A. The unqualified order of dismissal operates as a judgment of dismissal with prejudice:

1. Under state law.

28 U.S.C.A. § 2674 states in part as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . "

With the above language, the Congress has stated that the law of the place of the tort governs, and incorporates any and all defenses and bars thereto, including statutes of limitations. Arizona has a two-year limitation on the bringing of actions, which expired for

the appellants on October 18, 1958. See Arizona Revised Statutes, Section 12-542, which reads as follows:

> "There shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:
>
> "1. For injuries done to the person of another."

2. Under federal law

Kuzma v. Bessemer & Lake Erie Railroad, 3 Cir., 1958, 259 F.2d 456, held, per curiam, that a judgment of dismissal without qualification operates as a dismissal with prejudice, and creates a bar of res judicata in any other claims pending on the same subject matter.

B. The courts are loath to impose forfeitures, particularly in situations of default where the equities require trial on the merits to accomplish justice.

It has been held that even where cases have been dismissed, and some even adjudicated on the merits after trial, the courts will not hesitate to reopen where justice requires that a party be given a chance to introduce newly discovered evidence, or to have his claim tried on the merits.

1. Newly discovered evidence.

Serio v. Badger Mutual Insurance Company, 5 Cir., 1959, 266 F.2d 418, certiorari denied 361 U.S. 832, 80 S.Ct. 81, 4 L.Ed. 2d 73, involves a situation of newly discovered evidence.

At page 421 of the opinion, the court states:

> "The sole basis for the denial of the motion (under Rule 60(b)) was a failure of the insured to find and produce the records at an earlier time. No prej-

udice to the insurance companies is shown to have resulted from the delay in the discovery of the evidence. Under the circumstances the delay in the filing of the motion was not unreasonable. See Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. The rule is to be liberally construed in order that judgments may reflect the true merits of a case. 3 Barron & Holtzoff, Federal Practice and Procedure, Rules Ed., 392, §1322. * * * Serio * * * was deprived of the right to attempt to prove that he had sustained a loss within the terms of the policies, and the amount of his loss sustained, because of the Iron Safe Clause. That impediment, he asserts by his motion, is now removed. * * * The district court held that a prudent person would have searched for the records at the place where they were subsequently found by accident. We do not agree."

2. Forfeiture for want of prosecution.

In the second situation, in which the claimant has simply been deprived of a trial on the merits altogether, through some apparent failure or default on his part, the courts have still been favorably disposed to permitting an actual trial on the merits, and have held that Rule 60(b) should be most liberally construed in favor of the party who has not had his day in court. *United States v. Small,* D.C.N.Y., 1959, 24 F.R.D. 429; *Pierre v. Bernuth, Lembcke Co., Inc.,* D.C.N.Y., 1956, 20 F.R.D. 116.

The court stated in *United States v. Small, supra,* at page 430:

"It may be that defendant will be able to defeat

plaintiff's claim at the trial, as will hereafter appear. Accordingly any doubt as to whether, in the court's discretion, the motion should be granted, is resolved in the movant's favor."

Pierre v. Bernuth, Lembcke Co., Inc., supra, at page 117 of the opinion, the court again resolves in favor of the movant, and dispenses justice from its "grand reservoir of equitable power to do justice in a particular case," as follows:

"Under Rule 60(b)(6), this Court may vacate the order dismissing this action for 'any * * * reason justifying relief from the operation' of the order, if such motion is made, 'within a reasonable time.' This provision is 'a grand reservoir of equitable power to do justice in a particular case.' 7 Moore, Federal Practice p. 308 (2d ed. 1950).

"Defendant objects to vacating the dismissal at this late date because of the difficulty of defending an action for an injury suffered more than eight years ago.

"There is no doubt that trial of the case at this time would impose severe hardship on the defendant. But such hardship to the defendant should not prevent this plaintiff from securing a determination of his cause of action on the merits. Defendant was aware of plaintiff's mental illness and could have protected itself to a substantial extent at least by concluding all investigation at that time so that, if plaintiff became able to proceed to trial, defendant would not be unprepared. In fact, defendant did examine plaintiff by deposition in 1949 prior to his commitment to the mental hospital." (Deletes supplied by the court).

The record before this court [R. 199 to end] shows that the Arizona District Court, unlike the New York District Court in the above two quoted cases, was most stingy in dispensing its equitable powers to the appellants and did not care whether the appellants' cases were ever tried on their merits or not. The court ruled not only that the affidavits were untrue by its denial of the appellants' motion, but also that some highly speculative contrary was true, which contrary premise permitted the District Court to dispense frontier justice in the nature of a 15th Century adversary proceeding prevalent at one time in the British courts, namely, the District Court wished to engage the appellants in verbal gymnastics and slight of hand, and to spend as little time in trial session as possible.

The District Court concluded that Rule 60(b) is in effect a bunch of nonsense, and that it does not have to resolve any doubts in favor of the appellants. Rather, it prefers to resolve doubts, if any, in favor of the appellee, toward the goal of summarily concluding the cases if possible.

This very court has stated the policy of the circuit, in line with *Klapprott v. United States,* 1949, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266, and *Tozer v. Charles A. Krause Milling Co.,* 3 Cir., 1951, 189 F.2d 242, in *Russell v. Cunningham,* 9 Cir., 1960, 279 F.2d 797, 804, as follows:

> "We realize that a Court has wide discretion in passing upon a motion under section 60(b) and that its action should not be set aside lightly with-

out a clear showing of abuse of discretion. *We realize, also, that the policy of the law is to favor a hearing of a litigant's claim on the merits.*" (Emphasis supplied.)

IV.
CONCLUSION

The District Court apprised the appellants of no criteria whatsoever in rendering its unfavorable decision and in failing to vacate judgment of dismissal with prejudice for the purpose of renoting and resetting their claims for trial. It is evidence of an abuse of discretion, in that the court cannot substantiate the position it takes, clearly in point with the following words from *Tozer v. Charles A. Krause Milling Co.*, 3 Cir., 1951, 189 F.2d 242, 245:

"What is excusable neglect and what is inexcusable neglect can hardly be determined in a vacuum. The opinion of the court below does not reveal what standard was applied nor what factors were weighed. The recent cases applying Rule 60(b) have uniformly held that it must be given a liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Henry v. Metropolitan Life Ins. Co., D.C. Va., 1942, 3 F.R.D. 142, 144. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. Huntington Cab Co. v. American Fidelity & Casualty Co., D.C. W.Va., 1945, 4 F.R.D. 496, 498; Standard Grate Bar Co. v. Defense Plant Corp., D.C. Pa., 1944, 3 F.R.D. 371, 372. Since the interests of justice are best served

> by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

In summary, the District Court should have resolved any ambiguity or doubt in favor of the appellants, and should have exercised its discretion toward the ends of justice and fair play in securing to the appellants a trial of their claims on the merits.

Respectfully submitted,

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APPENDIX "A"

APPENDIX "A"

Rule 60, Federal Rules of Civil Procedure.

(a) Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rules does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding,

or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

APPENDIX "B"

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IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF ARIZONA PHOENIX DIVISION

WILLIAM CARL CUNNINGHAM and VERA MAE CUNNINGHAM, husband and wife, and GLENN A. PRICE and JANE DOE PRICE, husband and wife, *Plaintiffs,*

vs.

UNITED STATES OF AMERICA, *Defendants.*

No. 2962 Phx
No. 2963 Phx
MOTION TO VACATE JUDGMENT

COME NOW the plaintiffs, pursuant to Rule 60, Federal Court Rules, Civil Procedure — District Courts, and respectfully move the court for an order vacating judgment of dismissal with prejudice entered under consolidated cause numbers 2962 Phx and 2963 Phx on .....day of....., 1959, on the following grounds:

1. Clerical mistakes in the judgments, orders and other parts of the records and errors entered for oversight and omission which should be corrected;

2. Mistake, inadvertence, surprise, or excusable neglect;

3. Newly discovered evidence which by due diligence could not have been discovered in time to proceed under Rule 59(b), Federal Court Rules, Civil Procedure — District Courts;

4. Fraud ,misrepresentation, or other misconduct of an adverse party;

5. The judgment is void;

6. Any other reasons justifying relief from the operation of the judgment of dismissal, as presented by the plaintiffs in affidavits submitted herewith.

GREIVE AND LAW
By R. R. Bob Greive
Attorneys for Plaintiffs.